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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1056

BERTRAM ZWEIBON, et al.,

Petitioners,

v.

JOHN N. MITCHELL, et al.,

Respondents.

MEMORANDUM OF MALCOLM J. BARRETT, ET AL., IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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The Zweibon petitioners seek to persuade the Court to review this case prior to a full development of the record in the remand proceedings ordered by the Court of Appeals by characterizing it as "a bellweather in the area of civil damages for unlawful and unconstitutional eavesdropping" in an area where there are "a substantial number of prospective plaintiffs" (Pet. p. 8). These characterizations are, however, refuted by the very document on which the Zweibon petitioners rely, i.e., the letter of Attorney General Levi to Senator Kennedy dated June 24, 1975. (Appendix E to the Zweibon petition.)

In that letter Attorney General Levi states that warrantless electronic surveillance will be authorized only if the Attorney General is satisfied that the subject of the sur-

veillance:

> "is either assisting a foreign-based political group, or plans unlawful activity directed against a foreign power or foreign-based political group
>
> • • •
>
> "electronic surveillance without judicial warrant is not conducted where there is no foreign involvement." (Zweibon Pet., App. E, p. 128a)

Given this current policy of the Department of Justice, it is evident that the issues raised in the Zweibon petition do not have such far-reaching consequences as would justify a premature review by this Court.

Nor are the issues here analogous to those presented in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975). *Albemarle* involved the claims of employees for *compensation* for actual injuries suffered as a result of unlawful employment discrimination. Here, plaintiff seeks to exact *punitive liquidated damages* from those who acted in a good faith belief that they were engaged in a constitutional effort to prevent terrorist attacks on foreign diplomats.

Finally, there is no substance to the argument that the decision below frustrates the intent of Congress in enacting Title III. In Section 2511 of Title III, Congress clearly indicated that it was not attempting to limit the powers of the President to authorize electronic surveillance deemed necessary to gather foreign intelligence information and to protect the national security.

The Senate Report on Title III states:

> "Where foreign affairs and internal security are involved, the proposed system of court ordered electronic surveillance envisioned for the administration of domestic criminal legislation is not intended necessarily to be applicable." S.Rep. No. 1097, 90th Cong., 2d Sess. 94 (1968).

Having made the choice to leave this area unregulated, it is impossible to believe that Congress intended to impose strict liability for punitive damages on those who made a good faith error as to the extent of this presidential power.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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